

A Lai Cheng Chong v Public Prosecutor

HIGH COURT (MUAR) — CRIMINAL APPEAL NO 41-59 OF 1991
RICHARD TALALLA J
3 JUNE 1993

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Criminal Procedure — *Contempt of court* — *Failure of appellant and counsel to attend hearing* — *Withdrawal of counsel during course of trial* — *Hearing postponed to later date but appellant and counsel failed to attend again* — *Whether that amounts to contempt* — *Approach court should take*

C

Legal Profession — *Advocate and solicitor* — *Liability as officer of court* — *Legal Profession Act 1976 s 35*

D

The appellant was convicted in the magistrates' court for an offence under s 20(1)(a) of the Drug Dependents (Treatment and Rehabilitation) Act 1983 and was sentenced to ten months' imprisonment. He appealed against conviction and sentence and the notice of appeal was signed by the appellant. Also thereon was a signature of a firm of solicitors of counsel for the appellant. The address in the notice was that of the solicitors'. At the hearing of the appeal, the appellant and counsel were absent and the court adjourned the matter to 27 October 1992. By a letter to the senior assistant registrar ('the SAR'), a few days before the new hearing date, the solicitors informed the court that they were no longer acting for the appellant as he wished to engage new counsel and requested that their presence on the new hearing date be excused. The SAR, on the court's instructions, telephoned the office of the solicitors and informed a clerk therein that counsel was required to appear in court on 27 October 1992. On that date, both counsel and appellant were again absent and the matter was adjourned for the second time to 14 November 1992. On that date, a partner in the said firm appeared as counsel for the appellant and apologized to the court. The sole issue for determination by the court was whether the appellant's and counsel's failure to appear before the court on 27 October 1992, resulting in the hearing having to be postponed, constituted a contempt of court.

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Held, making no order:

I

- (1) It is poor justice to dismiss the appeal in default of appearance especially of counsel but rather the court should protect the litigant's right to have his grievance heard. The court should find ways and means of dealing with the person responsible for the default and one way is to apply the law of contempt.
- (2) By placing themselves on record in the notice of appeal as representing the appellant, the solicitors had a duty to ensure that the appellant attended with counsel before the court. Their failure to do so which resulted in the hearing having to be adjourned, had

affected the course of justice and its administration whereby a prima facie case of contempt had been made out. A

- (3) However, due to the conflicting versions of events between the appellant and counsel as to the reasons which led to their non-appearance, the court gave the benefit of the doubt to both of them and made no order as to contempt since its proceedings are penal in nature. The court also took into account that both of them meant no disrespect and had apologized to the court as well as the fact that this was the first time circumstances such as these had been considered as constituting contempt. B

[Bahasa Malaysia summary C

Perayu telah disabitkan di mahkamah majistret atas kesalahan di bawah s 20(1)(a) Akta Penagih Dadah (Rawatan dan Pemulihan) 1983 dan telah dihukum penjara sepuluh bulan. Beliau telah membuat rayuan terhadap sabitan dan hukumannya dan notis rayuan itu telah ditandatangani olehnya. Terdapat juga tandatangan firma guaman peguambela perayu di atas notis itu. Alamat yang tercatat di dalam notis itu adalah alamat firma guaman itu. Pada hari pendengaran rayuan itu, perayu dan peguambela tidak hadir dan mahkamah telah menangguh kes itu ke 27 Oktober 1992. Beberapa hari sebelum tarikh perbicaraan baru, peguambela melalui surat kepada penolong kanan pendaftar ('PKP'), telah memberitahu mahkamah bahawa mereka tidak lagi mewakili perayu kerana beliau ingin melantik peguambela yang baru dan oleh yang demikian memohon untuk dikecualikan kehadiran mereka pada tarikh perbicaraan. PKP, atas arahan mahkamah, telah menelefon pejabat firma guaman tersebut dan memberitahu kerani di situ bahawa peguambela dikehendaki hadir pada 27 Oktober 1992. Pada tarikh itu, kedua-dua perayu dan peguambelanya sekali lagi tidak hadir dan mahkamah telah menangguhkan kes ke 14 November 1992. Pada tarikh tersebut, seorang rakan kongsi dalam firma guaman tersebut telah hadir sebagai peguambela perayu dan telah meminta maaf kepada mahkamah. Isu tunggal yang perlu diputuskan oleh mahkamah adalah sama ada kegagalan perayu dan peguambela untuk hadir di mahkamah pada 27 Oktober 1992, yang telah menyebabkan perbicaraan terpaksa ditangguhkan, merupakan suatu penghinaan mahkamah. D E F G

Diputuskan, tanpa membuat apa-apa perintah:

- (1) Adalah menjadi keadilan yang serba kurang jika mahkamah membatalkan rayuan atas kegagalan pihak-pihak, terutama sekali peguambela, untuk hadir di mahkamah tetapi sebaliknya, mahkamah harus melindungi hak litigan untuk mengutarakan kesnya. Mahkamah harus mencari jalan untuk bertindak terhadap orang yang bertanggungjawab atas keingkaran itu dan satu daripada caranya ialah dengan menggunakan undang-undang penghinaan mahkamah. H
- (2) Dengan meletakkan nama mereka dalam rekod di dalam notis rayuan sebagai mewakili perayu, peguambela mempunyai I

- A tanggungjawab untuk memastikan kehadiran perayu dan dirinya sendiri di mahkamah. Kegagalan mereka berbuat demikian, yang menyebabkan perbicaraan terpaksa ditangguhkan, telah menggugat keadilan serta pentadbirannya dan satu kes prima facie penghinaan mahkamah telah dibuktikan.
- B (3) Walau bagaimanapun, oleh kerana versi kejadian perayu dan peguambela berbeza antara satu sama lain tentang sebab-sebab mengapa mereka gagal hadir di mahkamah, mahkamah mempercayai mereka walaupun berasa sangsi dan tidak membuat apa-apa perintah kerana prosiding penghinaan adalah suatu prosiding keseksaan. Mahkamah juga mengambil kira bahawa kedua-dua mereka telah meminta maaf dari mahkamah dan tidak berniat hendak menghinanya. Juga, keadaan seperti dalam kes ini pertama kali ditimbang dari sudut penghinaan mahkamah.]
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Notes

- D For cases on contempt of court, see 9 *Mallal's Digest* (4th Ed) paras 1373-1382.

Cases referred to

- E 1 *Rondel v Worsley* [1969] 1 AC 191; [1967] 3 All ER 993 (refd)
 2 *Swinfen v Lord Chelmsford* (1860) 5 H & N 890 (refd)
 3 *Parasharam Detaram Shamdassani v King-Emperor* [1945] AC 264 (distsd)
- F 4 *Joseph Orakwue Izuora v R* [1953] AC 327; [1953] 1 All ER 827 (distsd)
 5 *Ram Goswami v PP* [1985] 1 MLJ 113 (distsd)
 6 *Balogh v St Albans Crown Court* [1975] QB 73; [1974] 3 All ER 283 (refd)
- G 7 *Weston v Central Criminal Court Courts Administrator* [1977] QB 32 (distsd)
 8 *Syarikat Pasir Perdana v Goh Pak Hoong Tractor and Building Construction* [1981] 1 MLJ 314 (refd)
- H 9 *Go Pak Hoong Tractor and Building Construction v Syarikat Pasir Perdana* [1982] 1 MLJ 77 (refd)
 10 *Tan Pak v Cham Boon San and other actions* [1992] 2 MLJ 271 (refd)
 11 *Lumley v Wagner* (1852) 1 De GM & G 604 (refd)
- H *M Puravalen (Vazeer Alam with him) (Shafee & Co) for the appellant. Abdul Rashid Daud (Deputy Public Prosecutor) for the public prosecutor.*

Richard Talalla J: The appellant was convicted in the magistrates' court of an offence punishable under s 20(1)(a) of the Drug Dependents (Treatment and Rehabilitation) Act 1983 and sentenced to ten months' imprisonment with effect from 20 October 1991. Being dissatisfied with the conviction and sentence, he appealed to this court against the same. The notice of appeal was signed by the appellant. Also thereon was a signature in the name of a firm of advocates and solicitors ('the solicitors') expressing

themselves to be counsel for the appellant. The address given in the notice of appeal was the address of the solicitors. The court unilaterally set the appeal down for hearing on 29 September 1992 and by letter dated 1 September 1992, gave notice of that hearing to the learned deputy public prosecutor ('the deputy') and the solicitors. When on the hearing date the appeal was called on, the deputy appeared but not counsel for the appellant nor was the appellant present. Because the notice of the hearing was considered by the court to be somewhat short, and bearing in mind that the hearing date was unilaterally fixed, the court adjourned the hearing to 27 October 1992. By letter dated 22 October 1992 addressed to the senior assistant registrar ('the SAR'), the solicitors referred to the impending hearing on 27 October 1992 and stated that on 20 October 1992, the appellant had gone to their office and taken away the appeal record from them, saying that he wished to engage a new lawyer to conduct his appeal. Therefore, said the solicitors in the said letter, they were no more representing the appellant and they requested to be excused from attending the hearing on 27 October 1992. At my direction, the SAR, by way of reply to the said letter, telephoned the office of the solicitors and told a clerk there, all the lawyers being unable to speak then, that counsel was required to appear in court on 27 October 1992. When the appeal came on for hearing on 27 October 1992, again counsel for the appellant and the appellant were absent. In consequence, the appeal was by order adjourned to 14 November 1992 for hearing of the same and for such order or orders against the appellant or counsel for the appellant or both the appellant and counsel for the appellant by reason of their failure to attend and appear at the hearing of the appeal, as might be appropriate inasmuch as the fair administration of justice might have been affected by such failure to attend. At the same time, it was directed that the said order be served on the secretary of the Bar Council and the chairmen of the Johor and Kuala Lumpur Bar Committees.

The SAR, having extracted the said order, duly served the same as directed as did he serve the said order on the appellant and the solicitor.

When the appeal came on for hearing on 14 November 1992, a partner in the said firm appeared as counsel and commendably accepted full and personal responsibility as and for counsel at all material times representing the appellant in these proceedings. Counsel immediately thereafter intimated that no disrespect to the court was at any time intended and apologized for any inconvenience caused to the court.

There is only one issue and that is whether the failure of counsel and the appellant to appear before the court on 27 October 1992, resulting in the hearing having to be adjourned, constituted a contempt of court. In *Rondel v Worsley*,¹ Lord Reid made repeated references to counsel being an officer of the court concerned in the administration of justice and having an overriding duty to the court and the public. He also referred to that implicit trust between the Bench and the Bar which does so much to promote the smooth and speedy conduct of the administration. Lord Reid approved the statement of the court in *Swinfen v Lord Chelmsford*,² to the effect that the duty undertaken by an advocate is one in which the client, the court and the public have an interest because the due and proper and orderly administration of justice is a matter of vital public concern, that the advocate has a duty to

- A assist in ensuring that the administration of justice is not distorted or thwarted by dishonest or disreputable practices and that to a certain extent every advocate is an *amicus curiae*.

B Lord Reid's underlying message has been translated into the Legal Profession Act 1972 ('the Act') and the Legal Profession (Practice and Etiquette) Rules 1978 ('the Rules'). Under s 41 of the Act, there is established a body corporate called the Malaysian Bar. Under s 42 of the Act, its purpose is, inter alia, to uphold the cause of justice without regard to its own interests or that of its members. Under s 56 of the Act, the management of the Malaysian Bar is vested in the Bar Council. The Rules were made by the Bar Council under the powers conferred by s 77 of the Act. The Rules accordingly have the force of law. Pursuant to s 35 of the Act, an advocate and solicitor has, subject to the Act and any other written law, the exclusive right to appear and plead in all courts of justice in Malaysia. Rule 16 of the Rules requires an advocate and solicitor, inter alia, to uphold the interest of justice.

- D At no time has it been truer to say that justice delayed is justice denied. It cannot be disputed that at this point of time, justice is so delayed in our courts as to amount to denial. There is a huge backlog of cases. Statistics indicate that a main cause for this unfortunate situation is adjournment and postponement of trials on the date appointed for trial, largely occasioned by counsel applying for the same on a variety of grounds, most of them avoidable if counsel's affairs were managed fairly and reasonably, bearing in mind counsel's duty not only to the client but also to the court and the public at large.

- E As to the question of contempt of court my attention was drawn to the principle enunciated by Lord Goddard in the Privy Council case of *Parasharam Detaram Shamdasani v King-Emperor*³ at p 268 to the effect that for words or action used in the face of the court, or in the course of proceedings, for they may be used outside the court, to be contempt, they must be such as would interfere, or tend to interfere with the course of justice. It is true that *Parasharam's* case³ was applied by the Privy Council in *Joseph Orakwue Izuora v R*⁴ and the Singapore High Court in *Ram Goswami v PP*.⁵

- G The view I take however is that all three cases are distinguishable on the facts. In none of those cases was there being addressed a question of continuing delay in the courts in the face of a massive backlog of the cases resulting in justice being denied and in this case, such a question is being addressed. Loud and clear is the cry for speedier justice. The administration and the course of justice is gravely impaired. As stated by Lord Reid in *Rondel's* case,¹ public policy is not immutable. Neither, would it seem, is the application of the common law. Both change with the times and from country to country. To my mind, it is futile to apply in this country at this point of time, in the same way, a principle applied to facts pertaining to another country long ago — in *Parasharam's* case,³ it was India in 1942; in *Izuora's* case,⁴ Africa in 1963; and in *Goswami's* case,⁵ Singapore in 1977.

I I am aware that in *Balogh v St Albans Crown Court*⁶ at p 85, Lord Denning MR said:

This power of summary punishment is a great power, but it is a necessary power. It is given so as to maintain the dignity and authority of the court and to ensure a fair trial. It is to be exercised by the judge of his own motion only when it is urgent and imperative to act immediately — so as to maintain the authority of the court — to prevent disorder — to enable witnesses to be free from fear — and jurors from being improperly influenced — and the like. It is, of course, to be exercised with scrupulous care, and only when the case is clear and beyond reasonable doubt: see *R v Gray* [1900] 2 QB 36, 41 by Lord Russell of Killowen CJ. But properly exercised it is a power of the utmost value and importance which should not be curtailed.

*Weston v Central Criminal Court Courts' Administrator*⁷ was a case where the plaintiff, a solicitor who was acting for the accused in a criminal case, was informed that the case had been listed as a 'floater' for the next day. The solicitor objected unsuccessfully to the short notice whereupon he wrote an offensive letter to the defendant. He sent the client to the court by himself on the hearing date. The judge with the letter before him fixed the trial three days thereafter. The solicitor made further protests to the defendant and again did not attend court but sent his client with advice to ask the judge to adjourn the case to a date to be fixed. Under the circumstances, at the hearing, the judge ordered that the solicitor should attend before him the next day to explain his conduct. That order was communicated to the solicitor only by his client. The solicitor did not attend, the judge issued a bench warrant, the solicitor was arrested, there was a hearing whereafter the solicitor was found to be in breach of his duty as an officer of the court. On appeal, it was held, inter alia, that there was nothing that the solicitor had done to interfere with the due administration of justice and that he had not crossed the line dividing mere discourtesy and breach of duty to a client or the court from contempt. Again, that case is distinguishable on the facts from the present case. In *Weston's* case⁷ the solicitor was on very short notice indeed, whereas in the instant case, the court leaned over backward, so to speak, in reasonableness, to the solicitors in setting the appeal down for hearing as can be seen from the facts stated above. *Weston's* case⁷ however, is of some assistance in that at p 46 of the judgment, Stephenson LJ said that it was vitally important for the administration of justice that solicitors, no less than counsel, should assist the court by co-operating with its administrators and complying with the court's directions, whether they come from the judge as a request for help or as orders to be obeyed and that nowhere is co-operation more important than at the central criminal court where the enormous number of courts and cases presents special difficulties, and demands the maximum of mutual trust and goodwill if justice to all is to be done fairly and quickly. My own view is that there seems little point in repeating this comment of Stephenson LJ, in application to the situation in this country without providing a penalty for default.

Counsel's failure to appear with resultant disruption of the course of justice is not an uncommon occurrence. The malpractice is rampant and ongoing. More than ten years ago, Mohamed Zahir J in *Syarikat Pasir Perdana v Goh Pak Hoong Tractor and Building Construction*⁸ faced a situation the theme of which with variations has been repeated over the years. There, the defendant and his counsel were absent at the hearing, the former said

- A to be ill, the latter having failed to obtain a seat on an aircraft from Kuala Lumpur to Kota Bharu. The learned judge at p 315 had this to say:

The sick certificate stated that the defendant would be unfit for the proper performance of his duties. I did not know on the date of hearing, indeed even now, how sick he was. The medical certificate tells me nothing about his sickness.

- B The asking for adjournments by parties in this manner will always invariably place the court in a difficult position. Here is a case fixed for hearing about five months ago and suddenly on the date of hearing a telegram is received asking for adjournment. The court will have to consider each request for postponements on its own merits. But before the court can grant an adjournment, there should be good reasons. In this case I have only the telegram before me which I feel is insufficient for me to decide in favour of granting the adjournment...

- C The court cannot allow all adjournments sought. If an adjournment was allowed and it turned out later that the application for adjournment was not reasonable, then the court would be placed in a very awkward position. Time is being wasted. The respect for the court is eroded. In this case, if there is an application to set aside my order, I would have to enquire the real nature of the defendant's sickness and if it was such that he could not travel, I would allow the application.

- D The learned judge disallowed the application for adjournment and gave the plaintiff judgment in default. The defendants appealed. The Federal Court, in dismissing the appeal, held that the granting of an adjournment was in the absolute discretion of the court depending on the facts of each case and unless it could be shown that the discretion was improperly exercised, it should not be disturbed. See *Go Pak Hoong Tractor and Building Construction v Syarikat Pasir Perdana*.⁹

- E Coupled with the said comments of Mohamed Zahir J are my own observations in *Tan Pak v Cham Boon San and other actions*.¹⁰

- F As I see it, in cases such as the one before Zahir J and the present one and by way of example there is added applications for leave to appeal or file record of appeal out of time the litigant may be innocent, default attaching wholly to the legal representative. In such circumstances, it seems to me poor justice to terminate the proceedings by reason of the default leaving the distraught litigant with no more than the often futile prospect of proceeding against his errant lawyer with attendant prohibitive legal costs, delay in obtaining relief and possible frustration in getting a solicitor ready and willing to sue another. The court of course is concerned to bring an early end to litigation but anxiety so to do should not override the ends of justice. Rather, the court should be alert to protect the litigant's right to have his grievance carried through to final determination and find ways and means of dealing on the spot, so to speak, with the person truly responsible for the default and, as I see it, one way is to apply and if necessary, extend the law of contempt. In the instant case, the court was not prepared to dismiss the appeal in default of appearance but concerned to ascertain who was responsible for the default and deal with that person accordingly.

- I My attention was drawn to Registrar's Circular No 6 of 1960 which was in effect a direction from the honourable Chief Justice to presidents of the sessions court and magistrates' court in reference generally to defence

counsel applying to the court during the course of a trial for permission to withdraw from the case. The direction was that there was no question of any leave of the court being necessary, that it was purely a private matter between counsel and his client and that the court had no power to compel counsel to continue with the case if counsel did not wish to do so. With respect, the direction is in accord with the law. Counsel cannot be directed to continue acting any more than there can be an order for specific performance of a contract to sing as was declared in the celebrated case of *Lumley v Wagner*.¹¹ It is significant, however, that the direction does not address itself to the question of contempt of court. It does not mean that a counsel withdrawing from a case is immune from the laws of contempt and cannot be guilty of the same.

In the instant case, the legal adviser of the state of Johor took time from his heavy schedule of duties to appear himself in these contempt proceedings, he having considered that there was an important point of public interest involved. The learned legal adviser supported the court in its concern, adding that circumstances such as the present happen so much in the lower courts causing much disruption which the lower court judges and magistrates do not address themselves to. The Bar Council and the two Bar committees were not represented. Mr KS Dass of counsel appeared as *amicus curiae* and I thank him for the assistance provided.

I found that the solicitors having by the notice of appeal placed themselves on the court record as representing the appellant and having provided therein an address for service common to both the appellant and themselves, had a duty in their dual capacity as advocates and solicitors to ensure that the appellant attended by counsel appeared before the court on the day and at the time appointed for the hearing of the appeal and inasmuch as neither did so and their failure resulted in the hearing having to be adjourned, the course of justice relative to this case itself and its overall administration was affected and therefore a *prima facie* case of contempt of court had been made out.

In showing cause as to why an order for contempt of court should not be made, counsel's version of the circumstances leading to non-appearance differed from that of the appellant who personally addressed the court and claimed that it was not he who terminated the services of counsel but counsel who did not wish to act for him. Here then was a conflict of fact. Here also was a typical example of the mischief flowing from unilateral communication with the court by letter followed by failure to appear and make proper application before the judge, a practice which the learned legal adviser, no doubt with the disruption if not chaos that reigns in the lower courts and the public interest in mind and in full support of what was said in *Tan Pak's* case,¹⁰ deplored.

I had to bear in mind however that contempt proceedings are penal in nature. Accordingly, there being a conflict of versions either of which could be true, I gave the benefit of the doubt to both the appellant and counsel and made no order. In so doing, I took into consideration that both meant no disrespect and had apologized to the court as I did also the fact that this was apparently the first time that circumstances such as had occurred here have been considered as constituting a contempt of court.

- A** It only remains for me to say that counsel represents but a cog, albeit a vital one, in the machinery of justice which if it is to operate smoothly and efficiently would require all its components to be thoroughly functional. Thus the court itself will lead by example, sitting punctually and for reasonably long hours and the prosecution must be likewise ready and able.
- B** *No order made.*

Reported by Aslam Zainuddin

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